

FILED

FEB 16 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SALVADOR AVILES,

Defendant - Appellant.

No. 03-16565

D.C. Nos. CV-00-03250-TEH
CR-92-00403-TEH

MEMORANDUM^{*}

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Submitted February 13, 2006 ^{**}

Before: FERNANDEZ, RYMER and BYBEE, Circuit Judges.

Salvador Aviles appeals from the district court's order denying his 28
U.S.C. § 2255 motion challenging the sentence imposed following his conviction

^{*} This disposition is not appropriate for publication and may not be
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without
oral argument. *See* Fed. R. App. P. 34(a)(2).

for narcotics conspiracy and telephone charges. We have jurisdiction pursuant to 28 U.S.C. § 2253.

A limited certificate of appealability (“COA”) was granted on the issue of whether Aviles’ due process claim that his sentence was enhanced on the basis of facts not charged in the indictment, submitted to a jury, or proved beyond a reasonable doubt, has become a valid retroactive claim under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The retroactive application of *Apprendi* on collateral review is foreclosed by *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667 (9th Cir. 2002), and we affirm the district court.

To the extent that Aviles raises arguments not encompassed within the COA, we construe this as a motion to broaden the COA and deny the motion. *See* 28 U.S.C. § 2253(c)(2); 9th Cir. R. 22-1(e). We additionally deny Aviles’ motion for broader certification. *See id.*

AFFIRMED.